No. 92-418 (2)

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1992

A.J. ARAVE, WARDEN,

Petitioner,

v.

DONALD M. PARADIS,

Respondent.

Petition for Writ of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Donald M. Paradis submits this memorandum of law in opposition to the petition of A.J. Arave, Warden of the Idaho State Maximum Security Institution, for a writ of certiorari to review the decision of the Ninth Circuit Court of Appeals granting Paradis' habeas corpus petition with respect to the sentencing phase of Paradis' state trial.

STATUTORY PROVISION AND RULE OF THE SUPREME COURT

28 U.S.C. § 2101(c) provides, in relevant part:

> (c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the supreme court for review shall be taken or applied for within ninety days after the entry of such judgment or decree . . . .

Supreme Court Rule 13 provides, in relevant part:

> REVIEW OF CERTIORARI; TIME FOR PETITIONING
>
> .1. A petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort, a United States court of appeals, or the United States Court of Military Appeals shall be deemed in time when it is filed with the Clerk of this Court within 90 days after the entry of the judgment . . . .
>
> * * *
>
> .4. The time for filing a petition for a writ of certiorari runs from the date the judgment or decree sought to be reviewed is rendered, and not from the date of the issuance of the mandate (or its equivalent under local practice). However, if a petition for rehearing is timely filed in the lower court by any party in the case, the time for filing the petition for a writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of the petition for rehearing or the entry of a subsequent judgement. A suggestion made to a United States court of appeals for a rehearing in banc pursuant to Rule 35(b), Federal Rules of Appellate Procedure, is not a petition for rehearing within the meaning of this Rule.

STATEMENT OF THE CASE

Respondent Paradis was convicted, on the basis of wholly circumstantial evidence, of aiding and abetting in the murder of one Kimberly Palmer in Idaho. State v. Paradis, 106 Idaho 117, 676 P.2d 31, 35 (Idaho 1983) cert. denied, 468 U.S. 1220 (1984). The sentencing judge concluded that the defendant exhibited "utter disregard for human life"

pursuant to Idaho Code 19-2515(g)(6) even though he could not find that Paradis had killed Palmer. In reliance on this aggravating circumstance alone, the sentencing judge condemned Paradis to death. Findings at 16.[1]

Respondent Paradis appealed his conviction and sentence in the state courts of Idaho and sought habeas corpus relief in state and federal courts, maintaining, among other things, that he is innocent of the crime of which he has been convicted and that the evidence adduced at trial did not establish his guilt. In fact, since the Paradis trial, one Thomas Gibson has admitted that he killed Palmer in Washington and that Paradis had no part in her death. Additionally, since the denial of Paradis' habeas corpus petition in federal district court, one Larry Evans, the third man purportedly involved in Palmer's murder in circumstances indistinguishable from Paradis has been acquitted of Palmer's murder.

The United States District Court for the District of Idaho denied Paradis' claim for habeas corpus relief. Paradis v. Arave, 667 F. Supp. 1361 (D. Idaho 1987), aff'd in part, rev'd in part, 954 F.2d 1483 (9th Cir. 1992). On appeal, the Court of Appeals for the Ninth Circuit affirmed the district court's decision with respect to guilt. However, the Court of Appeals for the Ninth Circuit reversed the district court's denial of Paradis' habeas corpus petition with respect to Paradis' sentence of death and directed the district court to grant the habeas corpus petition on Paradis' claim that the state trial court had relied on an improper aggravating circumstance in imposing the penalty of death. 954 F.2d at 1495. Paradis'

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[1] The Findings of the Court in Considering Death Penalty Under Section 19-2515 Idaho code dated April 2, 1982 are referred to herein as "Findings at ___."

remaining claims regarding his sentence were thereby rendered moot and left undecided by the Ninth Circuit.

The judgment of the Ninth Circuit was rendered on January 23, 1992. On February 13, 1992 Paradis filed a Suggestion for Rehearing En Banc, see Appendix A, which was denied by the Court of Appeals by its order filed June 9, 1992. See Petition, App. 27. The Petition for Writ of Certiorari before this Court was not filed until September 1, 1992.

SUMMARY OF ARGUMENT

The petition for writ of certiorari must be denied because it was filed more than ninety days after the entry of judgment below on January 23, 1992. On February 13, 1992 Respondent Paradis filed a "Suggestion for Rehearing En Banc" pursuant to Fed. R. App. P. 35(b). Paradis' Suggestion does not toll the applicable ninety day period. See Sup. Ct. R. 13.4. The rules provide that if a "petition for rehearing" is timely filed, "the time for filing a petition for writ of certiorari runs from the date of denial of the petition." Id. Paradis, however, did not file a petition for rehearing. The rules further provide that "[a] suggestion made to a United States court of appeals for a rehearing in banc pursuant to Rule 35(b), Federal Rules of Appellate Procedure, is not a petition for rehearing within the meaning of this Rule." Id. Therefore, the ninety day period was not tolled and this Court lacks jurisdiction to grant the petition for writ of certiorari of Petitioner Arave.

In addition, the Ninth Circuit's decision that the utter disregard aggravating circumstance, as defined by the Idaho Supreme Court, is unconstitutionally vague is both correct and consistent with the decisions of this Court. Before Paradis was sentenced, the

Idaho Supreme Court had already held that I.C. § 19-2515(g)(6), which permitted the sentence of death to be imposed where "the defendant exhibits utter disregard for human life," was unconstitutionally vague on its face. State v. Osborn, 102 Idaho 405, 631 P.2d 187 (1981). The Idaho Supreme Court then attempted to limit the statutory language and defined "utter disregard for human life" to be "reflective of acts or circumstances surrounding the crime which exhibit the highest, the utmost, callous disregard for human life, i.e., the cold-blooded, pitiless slayer." Id. at 200-201.

The Osborn court's construction of "utter disregard," however, merely replaces one set of vague terms with another. It gives no guidance whatsoever to the sentencing judge and is itself unconstitutionally vague. See Walton v. Arizona, 110 S. Ct. 3047 (1990); Lewis v. Jeffers, 110 S. Ct. 3092 (1990); Maynard v. Cartwright, 486 U.S. 356 (1988). Indeed, given the lack of guidance provided by the Osborn construction, the sentencing judge in Paradis was compelled, to rely upon, among other things, his own notions of so-called "normal" and "common place" murders to support his finding of "utter disregard". The Ninth Circuit correctly held such reliance impermissible under this Court's precedent.

REASONS FOR DENYING THE PETITION

Point I

THE PETITION MUST BE DISMISSED BECAUSE IT WAS FILED MORE THAN NINETY DAYS AFTER THE ENTRY OF JUDGMENT

1. Petitioner Arave Had Ninety Days From The Date Judgment Was Entered To File A Petition For Writ Of Certiorari

"A petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by . . . a United States court of appeals, . . . shall be deemed in time when it is filed with the Clerk of this Court within ninety days of the entry of the judgment." Sup. Ct. R. 13.1; see also 28 U.S.C. § 2101(c). "The 90-day limit is mandatory and jurisdictional." Missouri v. Jenkins, 495 U.S. 33, 45 (1990). A petition not filed within ninety days of the entry of the Court of Appeals' judgment must be dismissed. Id.; see also Deal v. Cincinnati Board of Education, 402 U.S. 962 (1971) (petition denied where it was filed one day late); Department of Banking of Nebraska v. Pink, 317 U.S. 264 (1942); cf. Coleman v. Thompson, 111 S. Ct. 2546 (1991) (filing of notice of appeal one day late constituted adequate and independent state ground to support state supreme court's judgment).

"[I]f a petition for rehearing is timely filed in the lower court by any party in the case, the time for filing the petition for a writ of certiorari for all parties . . . runs from the date of the denial of the petition for rehearing or the entry of a subsequent judgment." Sup. Ct. R. 13.4. "A suggestion made to a United States court of appeals for a rehearing in banc pursuant to Rule 35(b), Federal Rules of Appellate Procedure, is not a petition for rehearing within the meaning of [Rule 13.4]." Id. It has been the Supreme Court's "consistent practice to treat suggestions for rehearing in banc presented to the United States Courts of Appeals that do not

also include petitions for rehearing by the panel as not tolling the period for seeking certiorari." Jenkins, 495 U.S. at 46.

The opinion of the Court of Appeals for the Ninth Circuit in Paradis v. Arave, 954 F.2d 1483, was filed on January 23, 1992 and judgment was entered on that date. The petition for writ of certiorari was not filed in this Court until September 1, 1992, two hundred and twenty-two days, i.e., more than ninety days, after January 23, 1992.

2. Respondent Paradis Did Not File A Petition For Rehearing And, Consequently, The Ninety Day Period Was Not Tolled

On February 13, 1992 Respondent Paradis filed a "Suggestion For Rehearing En Banc" in the Court of Appeals for the Ninth Circuit, a copy of which is annexed hereto as Appendix A. This document could not be interpreted to be a petition for rehearing within the meaning of Rule 13.4 of this Court and is in form and substance a Suggestion, and not a petition for rehearing, because:

(a) It is clearly denominated as a SUGGESTION FOR REHEARING EN BANC;

(b) It states "Petitioner Donald M. Paradis, by his attorneys, respectfully suggests that this case be heard en banc because . . . ." and

(c) It concludes, "The panel's decision affirming Paradis' guilt should be reviewed en banc and vacated for the reasons set forth above."

In fact, there is nothing in the "Suggestion For Rehearing En Banc" which could lead one to conclude that the Suggestion is a petition for rehearing.

The order of the Court of Appeals dated June 9, 1992 denying Paradis' Suggestion also stated also that "the petition for rehearing is denied." See Petition p. 27. However, the

language of the order is clearly erroneous. "The Court of Appeals of course cannot make the record what it is not." Jenkins, 495 U.S. at 49. Consequently, the mere fact that the June 9, 1992 Order stated that a purported petition for rehearing was denied does not mean that Paradis' timely filed a petition for rehearing, nor can it turn Paradis' Suggestion into a petition for rehearing and thereby toll the ninety-day time period for the filing of a petition for writ of certiorari. Cf. Jenkins, 495 U.S. at 49. ("The time for applying for certiorari will not be tolled when it appears that the lower court granted rehearing or amended its order solely for the purpose of extending that time.")

Petitioner cannot claim to have relied upon the June 9 Order in determining when to file the Petition for Writ of Certiorari, because the ninety day time period for the filing of the Petition expired six weeks before the June 9 Order was entered. Having failed to timely file its Petition, but knowing that this Court has granted certiorari in the Creech case, Petitioner is attempting to circumvent the rules by basing jurisdiction in this court upon the Ninth Circuit's order purportedly denying a petition for rehearing, but fails to inform this Court that Paradis had filed no such petition. Petitioner cannot base jurisdiction on an order which it knows is erroneous.

In addition, the June 9 Order does not represent any thoughtful consideration by the Ninth Circuit regarding the proper characterization of Paradis' Suggestion. It is a standard form order apparently issued as the result of a ministerial error. On July 16, 1992 Paradis' counsel wrote to the Clerk of the Court of Appeals requesting a corrected order with a copy to counsel for Petitioner. While the letter was apparently never received by the clerk, a deputy clerk has since orally informed Paradis' counsel that the order was a standard form order issued

irrespective of the fact that a petition for rehearing had not actually been filed and had nothing to do with the form or substance of Paradis' Suggestion.

Moreover, unlike in Missouri v. Jenkins, 495 U.S. 33 (1990), any characterization of Paradis' Suggestion by the Ninth Circuit cannot be at issue. In Jenkins, the document filed in the Court of Appeals was quite ambiguously designated as a "Petition for Rehearing En Banc." 495 U.S. at 46-47. Since it was unclear whether the document was a Petition for Rehearing or a Suggestion for Rehearing En Banc (there being no such thing as a Petition for Rehearing En Banc) this Court looked to the characterization of that document by the Court of Appeals. In this case, the document filed by Paradis in the Ninth Circuit was unambiguously denominated as a "Suggestion for Rehearing En Banc" and could not be confused with a petition for rehearing. This Court need not examine the intent behind this order, and to base a determination regarding the document's true nature upon the Ninth Circuit's June 9 order would be to permit the clerk of the Ninth Circuit inadvertently to recharacterize Paradis' Suggestion and make the record what it is not.

Point II

THE NINTH CIRCUIT CORRECTLY HELD THAT THE UTTER DISREGARD AGGRAVATING CIRCUMSTANCE PURSUANT TO WHICH PARADIS WAS CONDEMNED TO DEATH WAS UNCONSTITUTIONALLY VAGUE

1. The Idaho Utter Disregard Aggravating Circumstance Provides No Guidance to the Sentencing Judge

The sole aggravating circumstance that the sentencing judge found to exist was "that the murder and the circumstances surrounding its commission, that the defendant [Paradis] exhibited utter disregard for human life" within the meaning of Idaho Code § 19-2515(g)(6).[2] Findings at 12-13. This statutory section is unconstitutionally vague as it provides "[n]o meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not." Furman v. Georgia, 408 U.S. 238 (1972); See also Gregg v. Georgia, 428 U.S. 153 (1976). Indeed, the Idaho Supreme Court, recognizing that § 19-2515(g)(6) does not meet constitutional standards, has held that "inasmuch as a reasonable person could fairly characterize every murder . . . as exhibiting 'utter disregard for human life' it is equally apparent under Godfrey that this court must place a limiting construction upon . . . [this] statutory aggravating circumstance . . . so as to avoid the possibility of . . . [its] application in an unconstitutional manner." State v. Osborn, 102 Idaho 405, 631 P.2d 187, 200 (1981).

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[2] At the time of Paradis' sentencing hearing, § 19-2515(f)(6) provided the utter disregard aggravating circumstance. "In 1984, I.C. § 19-2515 was amended and section (f) became section (g). The language of the new section (g) and its subsections is identical to the language of the former section (f) and its subsections." State v. Caudill, 109 Idaho 222, 706 P.2d 456, 463 (1985).

The Idaho Supreme Court in State v. Osborn attempted to place a constitutionally sufficient limiting construction upon I.C. §19-2515(g)(6), but it did not succeed. Osborn was the only interpretation of § 19-2515(g)(6) by the Idaho Supreme Court available to the sentencing judge in the Paradis case. In Osborn, the Idaho Supreme Court interpreted the phrase "utter disregard for human life" as follows:

> to be reflective of acts or circumstances surrounding the crime which exhibit the highest, the utmost, callous disregard for human life, i.e., the cold-blooded, pitiless slayer.

Osborn, 631 P.2d at 201.

The Court of Appeals for the Ninth Circuit held in this case that the limiting construction placed upon the utter disregard aggravating circumstance by the Idaho Supreme Court was also unconstitutionally vague. 954 F.2d at 1495. The Petitioner now asserts that the Ninth Circuit's decision "threatens to open a new chapter in death penalty litigation in which the dominant theme will be that state courts must define all potentially subjective terms with lists of specific acts." Petition, p. 12. This misconstrues and misstates the Ninth Circuit's holding, which did no more than apply the law recently set forth by this Court in Walton v. Arizona, 110 S. Ct. 3047 (1990) and Lewis v. Jeffers, 110 S. Ct. 3092 (1990) and require that Idaho's aggravating circumstance give "some guidance" to the sentencer and make rationally reviewable the process for imposing a sentence of death. See Creech v. Arave, 947 F.2d 873, 879 (9th Cir. 1991) cert. granted, 112 S. Ct. 2963 (1992).

First, the Osborn language is vague on its face, as vague at the statutory language it purports to define. The phrase of the definition, "the highest, utmost, callous disregard for human life" is simply a restatement of, and indistinguishable from, the unconstitutional phrase

"utter disregard for human life." Cf., Maynard v. Cartwright, 486 U.S. 356, 364 (1988) (the word "especially" does not provide the necessary guidance). "Utter" is synonymous with "highest" and "utmost." Of course, any disregard for human life is essentially "callous."

The sentencing judge acknowledged that the term "pitiless" gave him no guidance whatsoever and stated: "The term pitiless adds little, if anything." Findings at 13.

There is only one term remaining in the Osborn definition, "cold-blooded", which also provides no clear and objective standard or limiting guidance. Cf. Moore v. Clarke, 904 F.2d 1226, 1230 (8th Cir. 1990), rehearing denied, 951 F.2d 895 (8th Cir. 1991), cert. denied, 112 S. Ct. 1995 (1992) (although the phrase "coldly-calculated" may have an "aura of objectivity about it," considered with "absence of regard for human life language," the phrase is unconstitutionally vague).

In Moore v. Clarke, the Court of Appeals for the Eighth Circuit considered the Nebraska Supreme Court's limiting construction of the especially heinous aggravating circumstance.[3] The Court of Appeals held that "the phrase, 'so coldly calculated as to indicate a state of mind totally and sensely bereft of regard for human life' offers little, if any objective guidance." Moore, 904 F.2d at 1232. This phrase is essentially indistinguishable from the Osborn construction.

Like the Ninth Circuit, the Eighth Circuit in Moore considered the effect of Walton and Jeffers on its decision. Moore v. Clarke, 951 F.2d 895 (8th Cir. 1991). The Eighth Circuit concluded that "Jeffers reasserts the requirement that a state "'channel the sentencer's discretion

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[3] In Moore, the Nebraska Supreme Court had defined the especially heinous aggravating circumstance in terms of disregard for human life. In the Paradis case, the State did not even try to prove the especially heinous aggravating circumstance, even though the Idaho Supreme Court had adopted the Nebraska Supreme Court's definition of the especially heinous aggravating circumstance. See Osborn, 631 P.2d at 200.

by "clear and objective standards" that provide "specific and detailed guidance," and that "make rationally reviewable the process for imposing a sentence of death."'" Jeffers, 110 S. Ct. at 3099 (quoting Godfrey v. Georgia, 446 U.S. 420 (1980)." 951 F.2d at 896. This Court declined to review the Eighth Circuit's decision in Moore. Moore v. Clarke, 112 S. Ct. 1995 (1992).

The Osborn language is readily distinguishable from the limiting definitions which the Supreme Court upheld in Walton and Jeffers. In Walton, the Supreme Court approved a limiting definition of "especially heinous, cruel or depraved" which had been construed by the Arizona Supreme Court to require that it be found beyond a reasonable doubt that the perpetrator inflicted mental anguish or physical abuse before the victim's death. Walton, 110 S. Ct. at 3057-58. Likewise, in Jeffers the Supreme Court held that "a rational factfinder could have found that respondent both relished the crime and inflicted gratuitous violence on the victim," as required by the Arizona Supreme Court's definition. Jeffers, 110 S. Ct. at 3104 (emphasis added). Walton and Jeffers each held that a limiting definition requires the sentencing judge to find objective facts, such as mental anguish, physical abuse, relishment of the crime or gratuitous violence. Unlike the limiting definition at issue in Walton and Jeffers, the Idaho language of utter disregard allows the sentencing judge to apply his unchannelled judgment, does not require him to find any objective facts and does not impose a process on the sentencing judge which can be rationally reviewed.

Moreover, the Osborn language permits utter disregard for human life to be based on unspecified acts or circumstances surrounding the crime. The Osborn language allows the sentencing judge to rely upon the totality of the circumstances surrounding the crime. It allows

the sentencing judge to rely upon those acts not even committed by the defendant.[4] Courts have consistently held that language permitting the sentencer to rely upon the circumstances surrounding a crime when imposing the death sentence is unconstitutional. See Moore v. Clarke 904 F.2d 1226, 1231 (8th Cir. 1990); Cartwright v. Maynard, 822 F.2d 1477, 1491 (10th Cir., 1987), aff'd, 486 U.S. 356 (1988). In rejecting language similar to the Osborn definition which referred to the circumstances surrounding the murder, the Tenth Circuit held:

> We agree that all the circumstances surrounding a murder must be examined to determine whether the murder was "especially heinous, atrocious, or cruel," but there must be some objective standard that specifies which circumstances support such a determination. Consideration of all the circumstances is permissible, reliance upon all of the circumstances is not. When the sentencer is free to rely upon any particular event that it believes makes a murder "especially heinous, atrocious, or cruel," the meaning that the sentencer attached to the provision "can only be the subject of sheer speculation." Godfrey, 428 U.S. at 429 . . . . The discretion of a sentencer who can rely upon all of the circumstances of a murder is a complete and as unbridled as the discretion afforded the jury in Furman. No objective standards limit that discretion.

Cartwright, 822 F.2d at 1491.

2. The Vagueness of the Osborn Construction Is Apparent From Its Application to Paradis

The vagueness and breadth of the Osborn construction is readily apparent from its application to Donald Paradis.

Osborn's definition of the utter disregard aggravating circumstance provided an example: the cold-blooded, pitiless slayer. This example is irreconcilable with Paradis' conduct under the

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[4] The Osborn language omits the statutory requirement that the defendant exhibit utter disregard for human life. In this manner, the construction by the Idaho Supreme Court actually invites an expansion of the statutory language.

prosecution's theory of the case. The state has maintained that one Scott Currier had been killed in Washington, although not by Paradis. Petition, p. 6. Currier's body was then placed in a van with Palmer and Gibson and taken to Idaho. Id. At some point before Palmer was killed, Paradis and Evans joined the van. Findings at p. 10. Then "Palmer escaped and was chased down a steep hill, caught and strangled to death by Paradis or one of the others." Petition, p. 7.

Under the prosecution's theory, Palmer's killer acted quickly upon her attempted escape. It was never proven that Paradis had planned and premeditated Palmer's murder. In fact, the sentencing judge expressly held that he could not find that Paradis killed Palmer and could not find how long before the murder Paradis had joined Gibson and Evans in the van. Findings at p. 10-11. Given the vagueness of the utter disregard definition, the sentencing judge was nonetheless able to find that Paradis satisfied the Osborn definition of "cold-blooded" and found "utter disregard."

The vagueness of the utter disregard aggravating circumstance also made it possible for the sentencing judge to conclude that the killing of a potential witness necessarily demonstrated utter disregard for human life. Although the sentencing judge could not find that Paradis killed Palmer, he concluded that Palmer was killed because she was a potential witness to the murder of Scott Currier (for which Paradis had been acquitted), notwithstanding that he expressly acknowledged that he could not find Paradis was present when Currier was killed. Findings at 9. The sentencing judge expressly found that "the motive for the killing of . . . Palmer in and of itself is substantial evidence that the commission of her murder was accomplished for reasons,

and under circumstances which exhibit an utter disregard for human life . . ."[5] Findings at 14. Neither the statute, I.C. § 19-2515(g)(6), nor Osborn, nor any other case except that of Paradis' codefendant, Thomas Gibson, have ever equated the murder of a potential witness with the utter disregard aggravating circumstance. However, the Osborn construction is so vague that it permitted the judge to call killing a potential witness "utter disregard" in this case. This is precisely the type of discretion which the Court, since Furman v. Georgia, has consistently held unconstitutional.

The most eloquent demonstration that the Osborn construction does not provide guidance to the sentencing judge, but leaves him unbridled discretion, are the words of the sentencing judge himself in deciding whether to find the "utter disregard" aggravating circumstance and condemn Donald Paradis to die:

> [T]he murder that was committed in this case was not what might be called a 'commonplace' murder, or what has sometimes been described as a 'normal' murder (if that can be possible). It did not involve an interfamilial situation or persons who were previously associated as do many, if not most, murders. There was not even a hint of any emotional upheaval as is often the case. There is no evidence that the use or abuse of alcohol or any controlled substance contributed to the situation as is usually the situation in the so-called "common" murder.

Findings at 16. Here, the judge was equating his sense of "abnormal" and "uncommon" murders with utter disregard, which is exactly what Godfrey, Maynard, Walton, and Jeffers

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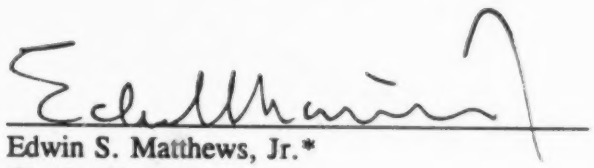
[5] The prosecution tried to prove a second aggravating circumstance, I.C. § 19-2515(f)(10), which was applicable when the murder was committed against a witness or potential witness in a criminal or civil proceeding. Findings at 7. The sentencing judge found that the (f)(10) aggravating circumstance was not applicable to Paradis. Findings at 13.

prohibit. If the Osborn construction of "utter disregard" had given any guidance to the sentencer, the sentencing judge could not have found an aggravating circumstance to exist in reliance upon his subjective conclusion that the murder was not "commonplace" or "normal."

Even if the utter disregard aggravating factor is capable of constitutional limitation, Idaho has not found one. Certainly, it did not do so in this case. The Ninth Circuit's decision here was clearly correct and dictated by this Court's precedent.

CONCLUSION

For the foregoing reasons, Respondent Paradis respectfully requests that this Court deny the petition for writ of certiorari.



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APPENDIX A

SUGGESTION FOR REHEARING EN BANC

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DONALD M. PARADIS,	)	No. 87-4100
	)	
Petitioner-Appellant	)	District Court
	)	No. 86-1188
vs.	)	District of Idaho
	)	
A. J. ARAVE, Warden, Idaho State Correctional Institution, and AL MURPHY, Director of Idaho State Board of Corrections,	)	SUGGESTION FOR REHEARING EN BANC
	)	
Respondents-Appellees	)	CAPITAL CASE

PRELIMINARY STATEMENT

Petitioner Donald M. Paradis, by his attorneys, respectfully suggests that this case be heard en banc because: (1) the panel decision (the "Decision") overlooks material points of fact and law on Paradis' innocence, as outlined below; (2) the panel decision misapplies Jackson v. Virginia, and, if allowed to stand, would place this Circuit in conflict with other federal circuits because, inter alia, the Decision effectively applies a dramatically lesser or "some evidence" standard for appellate

review under Jackson v. Virginia; and (3) the panel decision misapplies 28 U.S.C. § 2254(d) and Sumner v. Mata, by improperly deferring to state court conclusions of law.

PROCEDURAL BACKGROUND

Paradis sought review by this Circuit of the denial by the U. S. District Court for the District of Idaho of his petition for a writ of habeas corpus with respect to his conviction and death sentence in Idaho. On January 23, 1992, after considering his appeal, the Circuit panel reversed the denial of Paradis' habeas corpus petition with respect to his sentence of death and ordered that he be resentenced, but affirmed the denial of habeas corpus relief with respect to the guilt phase of Paradis' trial, apparently misunderstanding clear and convincing evidence which is clearly irreconcilable with Paradis' guilt.

FACTS

Based solely upon circumstantial evidence, Paradis was convicted of aiding and abetting the murder of Kimberly Palmer up an isolated, dead-end road near Post Falls, Idaho, called Mellick Road. The victim's body was found partially submerged in a stream near Mellick Road. The body of her boyfriend, Scott Currier, who was killed in a house rented by Paradis 25 miles away in Spokane, Washington, was found nearby.

Paradis contends that he is innocent of Palmer's murder and that the victim was actually killed by one Thomas Gibson at Paradis's house in Spokane, Washington, and that the murder occurred hours before Gibson, Paradis and a third man, Larry Evans, brought her body to the Mellick Road site. Since Paradis' trial, Gibson, who was also convicted of Palmer's murder in

Idaho, has confessed several times to the murder of Palmer in Washington and has stated that the murder occurred when Paradis was not present and without Paradis' knowledge.[1] U.S. District Court Exhibit ("Exh.") 1,5,6 & 7. Paradis contends that, on returning home in Spokane early one morning, Paradis found the bodies of Palmer and Currier in his house, and, panicked and fearful, along with Gibson and Evans took the bodies out of his house and across the state line to Idaho. Based upon facts virtually identical to those before the jury in Paradis' case, Evans was acquitted of Palmer's murder because the jury could not find beyond a reasonable doubt that her murder had occurred in Idaho. Excerpts of Record, Tab 31 at 1.

In order to convict Paradis of murder, the State of Idaho had to prove beyond a reasonable doubt that the victim died at the Mellick Road site during a brief period of only a few minutes when Paradis, Gibson and Evans were present there. The evidence in the case came exclusively from two locations - Mellick Road in Idaho and the house in Spokane, Washington. The scientific evidence, discussed below, simply is irreconcilable with her death in Idaho, while the circumstantial evidence is equally consistent with her death either in Washington or Idaho.

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[1]The only existing direct testimony regarding what happened in the Spokane house, given by Gibson (at his trial and a later deposition), Rosanna Moline (to the Spokane police and at Paradis' Motion for a New Trial) and Larry Evans (at his trials in Idaho and Washington), supports Paradis' innocence of Palmer's murder.

ARGUMENT

THE PANEL OVERLOOKED CLEAR AND CONVINCING EVIDENCE OF INNOCENCE AND EFFECTIVELY HELD THAT A CONVICTION MUST BE UPHELD IF THERE IS SOME EVIDENCE OF GUILT, WHICH STANDARD WAS REJECTED IN JACKSON V. VIRGINIA, AND IMPROPERLY PRESUMED STATE COURT CONCLUSIONS OF LAW TO BE CORRECT IN VIOLATION OF SUMNER V. MATA

In determining whether the evidence was sufficient to support Paradis' conviction, the panel correctly stated the appropriate standard under Jackson v. Virginia, 443 U.S. 307 (1979), but misapplied that standard. As the panel noted, "Paradis is entitled to habeas corpus relief if it is found that upon the record evidence addressed at trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt." Paradis v. Arave et al., No. 87-4100, slip op. at 672 (9th Cir. January 23, 1992) (citing Jackson, 443 U.S. at 324.) However, in applying Jackson the panel failed to recognize "that guilt should never be found except on a rationally supportable 'subjective state of near certitude.'" West v. Wright, 931 F.2d 262, 268 (4th Cir. 1991) (citing Jackson, 443 U.S. at 315) cert. granted , 112 S. Ct. 656 (1991).

"If the evidence is consistent with both guilt and innocence, it cannot support a conviction." United States v. Varoz, 740 F.2d 772, 775 (10th Cir. 1984); see also United States v. Sanchez-Mata, 925 F.2d 1166 (9th Cir. 1991) (conviction reversed where evidence was consistent with both innocence and guilt). As the Eleventh Circuit has stated:

> Jackson requires that a reasonable juror be able to find the defendant guilty beyond a reasonable doubt, and if the evidence viewed in the light most favorable to the prosecution gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence of the crime charged, then a reasonable jury must necessarily entertain a reasonable doubt.

Cosby v. Jones, 682 F.2d 1373, 1383 (11th Cir. 1982). A fortiori, where the evidence adduced at trial, when viewed in the light most favorable to the government, is inconsistent with guilt, as is the evidence in this case, the Jackson standard is not met and the conviction must be reversed.

A. The Panel Apparently Overlooked Evidence Establishing Paradis' Innocence

The most significant evidence of Paradis' innocence in this case are serious wounds on the victim's body that could not have been inflicted until at least 30 minutes to as long as several hours after her death. The undisputed postmortem character and timing of these wounds made it physically impossible for the victim to have been killed at Mellick Road in Idaho. It was impossible for Paradis, Gibson and Evans to kill the victim at the site and subsequently to inflict wounds at the site at least 30 minutes to as long as several hours after her death because Paradis, Gibson and Evans were only at the Mellick Road scene for no more than 30 minutes.[2] The only possible explanation of what happened that is wholly consistent with all the evidence in this case is that the victim had been killed in Washington several hours before her body was brought to Idaho and left near Mellick Road.

The postmortem wounds on Palmer's body included a deep, open tear, or cut, in her genitals (labia) caused by a sharp instrument.[3] This fact was noted as one of the three "ANATOMIC

[2]At Paradis' trial, a witness who lived nearby, Mrs. Jones, testified that she observed a van drive up Mellick Road and three men walk down the road about one-half hour later. Trial Transcript (hereinafter "TR")-II-236-37. The day after the body was found, she told the police it was approximately 15 minutes. U.S. District Court Exhibits ("Exh.") 69, Exhibit 8, p. 5.

[3]Other postmortem wounds included chest abrasions consistent with her body having been dragged across a floor after death. Evidentiary Hearing, U.S. District Court ("EH")-III-496; EH-II-635-36; Probable Cause Hearing, p.20.

DIAGNOSES" at the beginning of the autopsy report on the victim prepared by the State's forensic pathologist, Dr. Brady; he recorded this injury as "a 1 1/2 long tear with no evident vital reaction", a clear reference to the postmortem quality of its infliction. Exh. 36, p. 7 (emphasis added). Despite what appears in his autopsy report and what it reveals to a trained and alert reader, Dr. Brady did not mention the labia tear at all in his trial testimony. Surprisingly, the autopsy report on the victim was not admitted as an exhibit at the trial due to error by Paradis' counsel, see TR-IV-582-3, and Dr. Brady was not asked about the cut at the trial.[4] The only evidence of the cut presented at the trial was a mention thereof by defendant's pathologist, Dr. Larson.[5] These facts are unchallenged by the State.

A thorough examination of the evidence of this case demonstrates that the labia cut did not bleed, and thus must have been inflicted after death. The only evidence at the trial regarding the labia wound was the testimony of Dr. Larson that the cut probably occurred after death because there was no "reaction" or "redness" or "evidence of bleeding". See footnote 5, supra. The labia cut would have been prone to bleed as the genitals are a vascular area of the body and are prone to bleed when cut. EH-VI-997. In the habeas proceeding (i) Dr. Brady, the State's pathologist, testified that this cut was completely covered by the victim's jeans, EH-II-312-15, and would have

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[4]Paradis' defense counsel, who had only been admitted to the bar several months before, was handling his first jury trial and was totally inexperienced, did not understand the significance of the labia cut, did not cross examine Dr. Brady about it and did not mention the cut or what it revealed in his argument to the jury. Evidentiary hearing before U.S. District Court ("EH")-IV-665-67.

[5]Dr. Larson stated simply ". . . I tried to determine from the autopsy report what caused the cut on the external labia of the deceased in which it was stated in the report that this did not appear to be a wound that had been produced before death. Probably occurred after death because there was no reaction to it, no redness around it, no evidence of bleeding, no evidence of blood." TR-V-581.

bled into the jeans had it been inflicted at any time sooner than one-half hour to one hour or more after the victim's death. EH-II-316, 318; EH-V-887-88; Evans Transcript, Brady Testimony, at 90-91, Tab 29, (ii) Dr. Lindholm, another State pathologist, testified that bleeding from the wound would have soiled Palmer's jeans if it had been inflicted within 15 minutes following death. EH-VI-997-1000 & 1044, and (iii) the State's central crime lab employed a sophisticated luminol chemical test for the presence of blood in the jeans and confirmed that there was no trace of blood on the victim's jeans. EH-VI-1097-98 & 1126-27.

The panel nonetheless speculated that "the jury could have rationally inferred from all the evidence that any blood on the jeans was washed away by the combined effect of rain water and the effect of the stream," citing the trial testimony of a State criminalist that "exposure to water can interfere with the ability to detect human blood on clothing material." Paradis v. Arave, slip op. at 674. (emphasis supplied). However, the panel failed to consider that the uncontroverted evidence in the case was that the cut was inflicted after death, showed no vital reaction and did not bleed.

Moreover, the criminalist cited by the panel in support of its finding did not testify about the labia cut and was not referring to the labia cut when he testified about water's interference with the detection of blood on clothing. TR-III-377-90. This expert testified only as to certain specific exhibits, collected from the Spokane house, which related to the Currier murder and not to the Palmer murder. Further, the criminalist only testified that heat and water caused "denaturization" (chemical alteration) of blood samples and did not suggest that water would make blood disappear and become undetectable. Id.

The panel also overlooked the highly sensitive luminol tests performed on the victim's jeans and the conclusions of these tests introduced in the habeas proceedings. These tests confirmed that

the jeans contained no trace of blood. The panel further overlooked the fact that neither the rain nor the stream washed away the blood on other parts of the victim's body which were under water and uncovered, as compared with the labia cut, which was completely covered by the victim's jeans and above the stream water line. EH-II-312-315 (Brady testimony); Exh. 8 to Elliot Deposition, Tab 18. Plaintiff's Exhibits at Trial 100, 101 and 102. In summary, the panel's finding completely overlooks the most important evidence before it and instead engages in speculation over what the jury might have found, speculation which is completely unsupported by the trial record.

There is no evidence at all in this case that Palmer's body was assaulted at the Mellick Road site after it was left there and before it was found the next day, and no explanation has been offered of how the postmortem labia tear could have been inflicted, within the time sequence of the case, if the victim was killed at Mellick Road. The only possible, rational explanation is that the victim was killed in Spokane, Washington some hours before her body was brought to Mellick Road (so as to allow enough time for the postmortem wounds to have been inflicted 30 minutes to hours after death so that they would show no vital reaction and would not bleed) and that Paradis, Gibson and Evans were simply leaving her body at Mellick Road. Paradis, Gibson and Evans were not present at the Mellick Road site for a sufficiently long time to make it even possible that Paradis, or any of his codefendants, killed her there and subsequently inflicted the labia wound.[6]

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[6]It is simply impossible for any rational person to believe that, within a time span of only 15 to 30 minutes, while Paradis, Gibson and Evans were at Mellick Road, these three men could have performed all of the following acts that the State's theory of this case required they did while at the site: (1) drive .38 miles up a narrow, steep mountain road beyond Mrs. Jones' house where they were observed on arrival at Mellick Road and turn the van around, (2) drive the van off the road and turn it over, (3) carry a bag containing the heavy body of Scott Currier up the road and 20-25 feet down a steep embankment, thick with brush (see Exh. 33), (4) scatter numerous objects from the van all over the hillside (see id. and TR-III-212-14), (5) chase Palmer 80 feet down a steep, thickly wooded hillside through a barbed wire fence to a stream, (6) first

It is inconceivable that Paradis' conviction could be upheld in the face of this unchallenged evidence. The evidence pertaining to the labia cut, considered as a whole, provides clear and convincing proof that the determination of Paradis' guilt of a murder which allegedly occurred in Idaho was erroneous. It cannot be the law of this Circuit that a claim of innocence based on facts established in the record of the case and irreconcilable with guilt, be denied.

B. The Panel Misapplied Jackson v. Virginia

Although the panel recognized that Jackson requires reversal of Paradis' conviction if, based upon the record evidence adduced at the trial, no rational trier of fact could have found proof of guilt beyond a reasonable doubt, Paradis v. Arave, slip op. at 672, the panel overlooked, or did not understand that, the above evidence is simply inconsistent with Paradis' guilt beyond a reasonable doubt even taken in the light most favorable to the prosecution, as required by Jackson. No rational trier of fact could have found Paradis guilty, based upon the State's circumstantial evidence, without ignoring the unchallenged evidence to the contrary.[7]

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strangle her from behind with her necklace (or ligature) and then manually strangle her from the front breaking her cricoid cartilage, (7) place her body in the stream before she was dead so she could aspirate water from the stream (as claimed by Dr. Brady), (8) remove her body from the stream, (9) wait for her to die and wait further for at least 30 minutes beyond death, (10) inflict the labia wound and other postmortem wounds on her body, (11) put her body back in the stream, (12) gather and place branches over the body, (13) climb 80 feet back up the steep embankment to the road and (14) walk .38 miles back down Mellick Road to Mrs. Jones' house where they were seen leaving the scene. (See TR-V-699-702). Although these facts were separately disclosed to the jury, Paradis' defense counsel, who based his defense on an equally preposterous alibi he knew, or should have known, was false, did not even suggest to the jury that the prosecution's scenario was impossible and contrary to reason.

[7]The other scientific evidence presented to the jury does not overcome the evidence that Palmer died in Washington. As the panel noted, Dr. Brady testified that the presence of fluid in the victim's lungs was "consistent" with her death in the stream, and held that Dr. Brady's

The evidence discussed above relating to the postmortem labia cut, provides a clear and convincing showing that it was physically impossible for Paradis to have killed Palmer in Idaho.[8] Although the panel invoked Jackson as a guide for those circumstances under which Paradis' conviction can stand, it nonetheless misapplied the Jackson test. It is well established that the Jackson test is not met where the evidence supports a finding of innocence as well as guilt. Varoz, 740 F.2d at 775; Cosby, 682 F.2d at 1383; see also United States v. Sanchez-Mata, 925 F.2d 1166 (9th Cir. 1991). Logic demands that where, as here, the evidence is weaker than in Cosby and actually produces a clear and convincing showing of innocence, no rational trier of fact could have found proof of guilt beyond a reasonable doubt, as required by Jackson.

Under the panel's own analysis, therefore, its holding cannot stand. It cannot be the law of this Circuit that such testimony, which supplies clear and convincing evidence of Paradis' innocence, could support a finding of guilt beyond a reasonable doubt which would satisfy the Jackson test. A reasonable doubt is not a grave or substantive doubt. Cage v. Louisiana, 111 S. Ct. 328 (1990).

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testimony on this issue supported the jury's finding that the murder occurred in Idaho. Paradis v. Arave, slip op. at 673. At the evidentiary hearing in the District Court, Dr. Brady testified that he did not mean that her aspiration of water was "more likely than not." EH-V-965; EH-II-347, V-962. Dr. Brady never said, because he could not say, that Palmer did not die in Washington. As for the other circumstantial evidence, the panel found that it, standing alone, was not sufficient to support the jury's verdict. Paradis v. Arave, slip op. at 674. Paradis has consistently argued to the district court and to the appellate panel that this proof fails to substantiate proof of guilt beyond a reasonable doubt. The panel's decision erroneously reaches a contrary conclusion without any mention whatsoever of whether an opinion of "consistency" can substitute for the requirement of "probability" in meeting the State's burden of proof. This fundamental question alone demands reconsideration on en banc review.

[8] "Clear and convincing evidence is evidence that produces in your mind a firm belief or conviction as to the matter at issue. This involves a greater degree of persuasion than is necessary to meet the preponderance of the evidence standard; however, proof to an absolute certainty is not required." Civil Pattern Jury Instructions, p. 18 (5th Cir. 1991).

A reasonable doubt is one which causes a rational person to "hesitate to act". See United States v. Wosepka, 757 F.2d 1006, mod. 787 F.2d 1294 (9th Cir. 1985). Proof beyond a reasonable doubt is proof of such convincing character that a rational person would be willing to act upon it without hesitation in the most important of that person's affairs. United States v. Newport 747 F.2d 1307, 1308 (9th Cir. 1984). Because there is clear and convincing evidence of Paradis' innocence, the Jackson test cannot be satisfied, as no rational jury could have found proof of Paradis' guilt beyond a reasonable doubt.

Likewise, the Idaho Supreme Court's holding did not meet the Jackson standard. The Idaho Supreme Court only concluded, after its review of the record, that there was evidence suggesting that Palmer was still alive in Idaho. State v. Paradis, 676 P.2d 31, 33 (Idaho 1983). Even presuming that the state court's holding that there was evidence suggesting that Palmer was alive in Idaho was correct, the holding did not, and cannot under Jackson, support the conclusion that a rational jury could have found beyond a reasonable doubt that Palmer was murdered in Idaho. The Idaho Supreme Court only found some evidence, merely a "suggestion", that Palmer was alive in Idaho.

Given the evidence of the postmortem labia wound, it is not plausible to conclude that a rational jury would have no hesitation or doubt in finding that Palmer died in Idaho. Essentially, the panel's opinion ignores the meaning of Jackson, and effectively replaces it with a new and lesser test. Under the panel's reasoning where there is some evidence consistent with the elements of the crime charged, and scientific medical evidence that is inconsistent with that evidence, a verdict can be upheld. This standard is even less stringent than the standard of review in a civil case (a preponderance of the evidence) and under the panel's standard, the prosecution would fail only

where there was a total absence of probative evidence; this "no evidence" standard was rejected in Jackson. See Cosby, 682 F.2d at 1383 n.21.

C. The Panel Misapplied Summer v. Mata

In order to conclude that the evidence produced at the trial was sufficient to persuade a rational jury that the victim died in Idaho, the panel incorrectly applied a presumption of correctness to the state court's legal findings that were not factual findings and, contrary to the panel's analysis, did not require proof beyond a reasonable doubt.

Applying a presumption of correctness, pursuant to 28 U.S.C. 2254(d), to the Idaho Supreme Court's decision and treating that decision as a "finding", the panel concluded that "there was evidence at trial suggesting that Palmer was still alive when she was placed in the stream bed." Paradis v. Arave, slip op. at 675 (emphasis supplied). In arriving at this conclusion, however, the panel overlooked the Supreme Court's decision in Sumner v. Mata, 455 U.S. 591 (1981), which held that mixed questions of law and fact are not governed by § 2254(d). Id. at 597. Sufficiency of the evidence is a mixed question of law and fact. Case v. Mondragon, 887 F.2d 1388 (10th Cir. 1989). Therefore, the panel should not have applied the presumption.

Even if it were correct to apply a presumption of correctness to the state court finding, and the state court had made a determination that the evidence was sufficient to find guilt beyond a reasonable doubt, the panel was required not to apply the presumption because the Idaho Supreme Court's finding of fact was not "fairly supported by the record." Sumner v. Mata, 455 U.S. at 592.

CONCLUSION

The panel's decision affirming Paradis' guilt should be reviewed en banc and vacated for the reasons set forth above.

Dated: February 13, 1992

Respectfully submitted,

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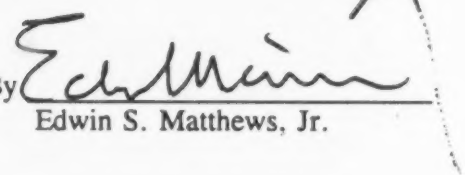
By 
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CERTIFICATE OF MAILING

I hereby certify that on this 13th day of February, 1992, I served a true and correct copy of the foregoing Suggestion for Rehearing En Banc or Petition for Rehearing on counsel for Respondents therein by placing a copy thereof in the United States mail, postage prepaid, addressed to:

Lynn E. Thomas, Esq.
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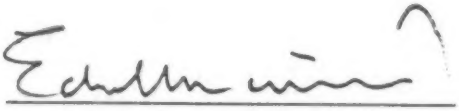

AFFIDAVIT OF SERVICE

STATE OF NEW YORK :
: SS.:
COUNTY OF NEW YORK :

June Cerra, being duly sworn, deposes and says:

On September 29, 1992 I served a true and exact copy of the annexed Brief in Opposition to Petition for Writ of Certiorari by placing a copy thereof in the United States mail, postage prepaid, addressed to:

Lynn E. Thomas, Esq.
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June Cerra

Sworn to before me this
29 day of September, 1992

Notary Public

ANN BUCHONG
Notary Public, State of New York
No. 01[illegible]
Qualified in New York County
Commission Expires Feb. 28, 1993